United States Department of Labor
Employees' Compensation Appeals Board

T.G., Appellant	)	
and	)	**Docket No. 06-756**
	)	**Issued: January 5, 2007**
DEPARTMENT OF VETERANS AFFAIRS, COATESVILLE VETERANS HOSPITAL, Coatesville, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 13, 2006 appellant, through counsel, filed a timely appeal from a January 31, 2006 decision of an Office of Workers' Compensation Programs' hearing representative finding that appellant had no more than a 16 percent impairment of the right upper extremity, for which he received a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has more than 16 percent impairment to the right upper extremity, for which he received a schedule award; and (2) whether he has established that his erectile dysfunction condition was caused or aggravated by the accepted work injury. On appeal, appellant's attorney contends that appellant is also entitled to a schedule award for his claimed erectile dysfunction.

FACTUAL HISTORY

On September 24, 2001 appellant, a 46-year-old housekeeping aid, filed a traumatic injury claim alleging that on September 23, 2001 he injured his right shoulder while throwing a heavy bag of trash into a dumpster. The Office accepted the claim for right shoulder acute and subacromial impingement. It authorized right shoulder arthroscopy and rotator cuff repair, which was performed on December 27, 2001. On September 16, 2002 the Office placed appellant on the periodic rolls for temporary total disability. On October 11, 2002 the Office accepted an aggravation of cervical degenerative disc disease, herniated disc at C5-6 and authorized anterior cervical fusion surgery, which was performed on December 9, 2002. Appellant accepted a limited-duty job offer and returned to work on August 10, 2004.[1]

In a letter dated September 2, 2004, appellant's attorney advised that appellant requested a schedule award.

In a report dated October 21, 2004, Dr. George L. Rodriquez, a Board-certified physiatrist, noted cervical degenerative disc disease with a herniated nucleus pulposus at C4-5 and C6-7, cervical radiculopathy cervical myelopathy, right shoulder rotator cuff impingement syndrome, right fourth digit Dupuytren's contracture and erectile dysfunction. He opined that appellant had significant neck and right upper extremity pain. Based upon a review of the medical records and a physical examination, Dr. Rodriguez opined that the diagnoses he listed were "attributable to the work-related injuries." He noted that appellant "has serious sequelae of cervical spinal stenosis and cervical myelopathy" and appellant's "right bicipital hyper-reflexia, C5-6 distribution fasciculations and erectile dysfunction are strong indicators of an ongoing cervical myelopathy." (Emphasis in the original). Based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001), appellant had a 1 percent impairment for right C6 sensory nerve root deficit,[2] a 16 percent impairment for C5 and C6 nerve root deficits[3] and a 10 percent impairment for distal clavicular resection arthroplasty[4] for a total impairment rating of 37 percent of the right upper extremity. Dr. Rodriguez also utilized Table 7-5 on page 156 to estimate that appellant had a 19 percent permanent impairment due to Class 2 erectile dysfunction.

In a report dated November 12, 2004, Dr. Dennis P. McHugh, a second opinion Board-certified osteopath, concluded that appellant had a 25 percent permanent impairment of the cervical spine and a 10 percent impairment of his right shoulder, for a total impairment of 31 percent. He noted that appellant had a rotator cuff tear, which had been treated by "subacromial decompression and rotator cuff repair." A physical examination revealed "50 percent decrease in active range of motion with flexion of the shoulder with the ability to only actively flex to 90 degrees." Dr. McHugh also reported "90 degrees of active abduction" and "appropriate active

[1] Appellant retired effective August 17, 2004 and elected benefits under the Civil Service Retirement System effective August 17, 2004.

[2] A.M.A., *Guides* 482, Table 16-10 and 489, Table 16-13.

[3] *Id.* at 484, Table 16-11and 489, Table 16-13.

[4] *Id.* at 506, Table 16-27.

range of motion with regards to internal and external rotation with 45 degrees external rotation" and 20 degrees internal rotation. He related that appellant had "an exacerbation of his preexisting cervical issues as well as acute herniated discs" and "was treated appropriately with anterior cervical discectomy and fusion." As to the cervical spine impairment, Dr. McHugh utilized "page 394 DRE [Diagnosis-Related Estimate] Cervical Category IV" to determine appellant's 25 percent whole person impairment rating due to his lack of motion as a result of the anterior cervical fusion. In reaching the right shoulder impairment, he used Figure 16-43, page 477 to determine a 4 percent impairment due to 90 degrees of abduction degrees and used Figure 16-47, page 477 to determine a 6 percent impairment due to loss of flexion, for a total 10 percent impairment of the right upper extremity. He opined that appellant had a 31 percent whole person impairment based due to the "combination of the impairment ratings for the two body parts of the cervical spine being 25 percent and the right shoulder being 6 percent."

In a supplemental report dated November 29, 2004, Dr. McHugh noted that the Federal Employees' Compensation Act did not provide schedule awards for impairment of the spine. He found a zero percent impairment of the right upper extremity "using Table 15/15, 15/16 and 15/17." Dr. McHugh noted that appellant "has no discernable sensory loss that followed any dermatomal path" and appellant "displayed no painless motor weakness, which could be attributable to neurological function." He opined that appellant had a 10 percent impairment of the right upper extremity due to loss of motion in the right shoulder.

In a December 6, 2004 report, Dr. McHugh reviewed Dr. Rodriguez' impairment rating and again concluded that appellant had a 10 percent impairment of the right upper extremity. He disagreed with Dr. Rodriquez that appellant sustained an employment-related right shoulder rotator cuff impingement syndrome as this condition "occurs overtime and is not a onetime event." Dr. McHugh also stated: "[t]here is absolutely no documentation of an objective fashion which shows the patient to be myelopathic." As to the degenerative disc disease, he related it was not due to appellant's employment injury as this condition occurs overtime and appellant had a history of spinal problems. Dr. McHugh opined that appellant displayed "no objective findings of symptomatic radicular issues" and there were "no muscle weakness contributable to neurologic deficits nor does he have any sensory loss that is consistent in the dermatomal pathway." He stated that he was unable to "find any objective evidence" to support that appellant's erectile dysfunction was due to the myelopathy and cervical stenosis. Dr. McHugh stated that he "would need some formal explanation as to how a cervical herniated disc could impinge on the spinal cord in an individual's neck, which would result in erectile function yet cause no other myelopathic issues." He also questioned how Dupuytren's contracture of the right fourth digit was employment related and found that this condition was not employment related.

In a report dated December 16, 2004, an Office medical adviser reviewed the reports of Drs. McHugh and Rodriguez. He noted that appellant sustained a work-related impingement syndrome and rotation cuff tear with acromionectomy arthroplasty. The medical adviser utilized the A.M.A., *Guides* to rate impairment for shoulder loss of range of motion. Utilizing Table 16-43, abduction of 90 degrees was equal to 4 percent impairment. Using Table 16-40, forward flexion of 90 degrees was equal to 6 percent impairment and extension of 35 degrees was equal to 1 percent impairment. Regarding external rotation of 45 degrees and the internal rotation of 20 degrees, the Office medical adviser referred to Figure 16-46 and determined that the external

rotation was equal to 1 percent impairment and the internal rotation was equal to 4 percent impairment. The total right upper extremity impairment was 16 percent and appellant reached maximum medical improvement on December 21, 2001. The Office medical adviser commented that Dr. McHugh's report was in conflict with Dr. Rodriguez' report regarding motor and sensory examination. Dr. McHugh indicated a "normal motor [and] sensory exam[ination]."

By decision dated January 25, 2005, the Office granted appellant a schedule award for 16 percent impairment of the right upper extremity. The award covered 49.92 weeks for the period August 16, 2004 to July 31, 2005.

In a letter dated January 26, 2005, appellant's attorney requested an oral hearing, which was subsequently changed to a review of the written record.

In a decision dated January 31, 2006, the hearing representative affirmed the January 25, 2005 decision. As to the claimed erectile dysfunction, the hearing representative found the evidence insufficient to establish a causal connection between the condition and appellant's accepted September 23, 2001 employment injury.

LEGAL PRECEDENT -- ISSUE 1

Under section 8107 of the Act[5] and section 10.404 of the implementing federal regulation,[6] schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides*[7] has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[8]

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.[9] As neither the Act nor its regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole, no claimant is entitled to such a schedule award.[10] The Board notes that section 8109(19) specifically excludes the back from the definition of organ.[11] However, a claimant may

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

[8] 20 C.F.R. § 10.404.

[9] *See Joseph Lawrence, Jr., supra* note 7; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989).

[10] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[11] 5 U.S.C. § 8107; *see also Phyllis F. Cundiff*, 52 ECAB 439 (2001); *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

be entitled to a schedule award for permanent impairment to a scheduled member or organ even though the cause of the impairment originated in the neck, shoulders or spine.[12]

ANALYSIS -- ISSUE 1

The issue before the Board is whether appellant has more than 16 percent impairment of the right upper extremity.

Dr. Rodriquez, a Board-certified physiatrist, noted cervical degenerative disc disease with a herniated nucleus pulpous at C4-5 and C6-7, cervical radiculopathy cervical myelopathy, right shoulder rotator cuff impingement syndrome, right fourth digit Dupuytren's contracture and erectile dysfunction. He opined that appellant suffers "significantly from his neck and right upper extremity pain." Based upon a review of the medical records and a physical examination, Dr. Rodriguez opined that the diagnoses he listed were "attributable to the work-related injuries." He noted that appellant "has serious sequelae of cervical spinal stenosis and cervical myelopathy" and appellant's "right bicipital hyper-reflexia, C5-6 distribution fasciculations and erectile dysfunction are strong indicators of an ongoing cervical myelopathy." (Emphasis in the original). Dr. Rodriguez noted that, based on the A.M.A., *Guides*, appellant would receive a 1 percent impairment for right C6 sensory nerve root deficit,[13] 16 percent impairment for C5 and C6 nerve root deficits[14] and a 10 percent impairment for distal clavicular resection arthroplasty[15] for a total impairment rating of 37 percent of the right upper extremity. He also utilized Table 7-5 on page 156 to estimate that appellant had a 19 percent permanent impairment due to Class 2 erectile dysfunction.

In a supplemental report dated November 29, 2004, Dr. McHugh noted that the Act "does not provide schedule awards for impairment of the spine" as there was "no discernable sensory loss that followed any dermatomal path" and appellant "displayed no painless motor weakness which could be attributable to neurological function." In concluding, he opined that appellant had a 10 percent impairment of the right upper extremity due to loss of motion in the right shoulder. In a December 6, 2004 report, Dr. McHugh noted his disagreement with Dr. Rodriguez' report which included an impairment rating for the cervical spine. He stated that the conditions of erectile dysfunction, right shoulder impingement syndrome, right cervical myelopathy, degenerative disc disease and Dupuytren's contracture of the right fourth digit were not employment related.

The Board finds that the Office medical adviser's impairment rating for appellant's right upper extremity due to his right shoulder condition based on Dr. McHugh's report noting decreased range of motion was correctly based on the A.M.A., *Guides*. Applying Tables 16-40, 16-43 and 16-46 of the fifth edition of the A.M.A., *Guides* to Dr. McHugh's findings on physical examination on a November 12, 2004 report, he properly assigned 4 percent for 90 degrees of

[12] 5 U.S.C. § 8109(c).

[13] A.M.A., *Guides* 482, Table 16-10 and 489, Table 16-13.

[14] *Id.* at 484, Table 16-11 and 489, Table 16-13.

[15] *Id.* at 506, Table 16-27.

abduction, 6 percent for 90 degrees of flexion, 1 percent for 35 degrees of extension, 1 percent for 45 degrees of external rotation and 4 percent for 20 degrees of internal rotation, for a total impairment rating of 16 percent of the right upper extremity.

The Board, however, finds that there is a conflict in the medical opinion evidence, as noted by the Office medical adviser in his report, between Dr. Rodriguez and Dr. McHugh on the issue of whether appellant had sensory and motor impairment due to his cervical spine. This conflict is based on the contrasting clinical findings reported by the physicians. Two physicians, following the methods of the A.M.A., *Guides* to evaluate the same patient, should report similar results and reach similar conclusions.[16] Here, the findings of one physician support a 17 percent permanent impairment of the right upper extremity based upon cervical spine impairment; the findings of the other found no impairment. Specifically, Dr. McHugh reported a normal examination while Dr. Rodriguez found motor and sensory impairment on examination. Appellant may be entitled to a schedule award for permanent impairment of his right upper extremity, even though the impairment originated in his spine, if the accepted back condition caused such impairment. Section 8123(a) of the Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[17] Accordingly, the case must be remanded for further development.

On remand, the Office should refer appellant, together with the case record and statement of accepted facts, to an appropriate Board-certified specialist for an impartial evaluation and calculation of his work-related permanent impairment based on correct application of the fifth edition of the A.M.A., *Guides*. After such further development as it deems necessary, the Office shall issue a *de novo* decision.

LEGAL PRECEDENT -- ISSUE 2

An employee seeking compensation under the Act has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence.[18]

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.[19] Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be

[16] A.M.A., *Guides* 17.

[17] 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

[18] *Michael S. Mina*, 57 ECAB ___ (Docket No. 05-1763, issued February 7, 2006); *Gary J. Watling*, 52 ECAB 278 (2001).

[19] *Frankie A. Farinacci*, 56 ECAB ___ (Docket No. 05-1282, issued September 2, 2005); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[20] Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[21]

ANALYSIS -- ISSUE 2

The Office hearing representative denied appellant's claim for a schedule award for erectile dysfunction on the grounds that the medical evidence was not sufficient to establish a causal relationship between his erectile dysfunction and the accepted right shoulder acute and subacromial impingement and aggravation of cervical degenerative disc disease, herniated disc at C5-6. The Board notes that, before application of the A.M.A, *Guides,* the Office must determine whether the claimed impairment of a scheduled member is causally related to the accepted work injury.

The Office developed the issue of whether appellant's erectile dysfunction was causally related to the right shoulder acute and subacromial impingement, aggravation of cervical degenerative disc disease, herniated disc at C5-6 and authorized anterior cervical fusion surgery. The issue of whether the work injury and subsequent surgery had adversely affected appellant's erectile dysfunction and resulted in a permanent penile impairment was first raised in Dr. Rodriquez's October 21, 2004 report. Dr. Rodriquez, however, did not describe any examination findings or testing related to that issue nor did he provide any explanatory rationale to support his conclusion on causal relationship.[22] Accordingly, Dr. Rodriquez's opinion is of diminished probative value on this issue.

Dr. Rodriguez's report is insufficient to establish that appellant's erectile dysfunction is related to the accepted employment injury. As appellant has not discharged his burden of proof on the issue of causal relationship, the Office properly denied his claim for a schedule award with regards to his erectile dysfunction.

CONCLUSION

The Board finds this case is not in posture for a decision on whether appellant's accepted employment injuries caused more than a 16 percent impairment to his right upper extremity. The Board finds that a conflict in medical opinion exists between the Office's referral physician and his physician. The Board also finds that appellant is not entitled to a schedule award for his claimed erectile dysfunction.

[20] *Kathryn E. Demarsh,* 56 ECAB ___ (Docket No. 05-269, issued August 18, 2005); *Leslie C. Moore,* 52 ECAB 132 (2000); *Gary L. Fowler,* 45 ECAB 365 (1994).

[21] *Daniel O. Vasquez,* 57 ECAB ___ (Docket No. 06-568, issued May 5, 2006); *Dennis M. Mascarenas,* 49 ECAB 215 (1997).

[22] *See Donald W. Wenzel,* 56 ECAB ___ (Docket No. 05-146, issued March 17, 2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 31, 2006 is affirmed in part, set aside in part and remanded for further proceedings consistent with the above opinion.

Issued: January 5, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board